

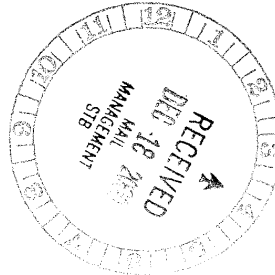
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December 18, 2000

The Honorable Vernon L. Williams
Surface Transportation Board
Case Control Unit
Attn: STB Ex Parte No. 582 (Sub-No. 1)
1925 K Street, N.W.
Washington, D.C. 20423

Re: Ex Parte No. 582 (Sub-No. 1)
Major Rail Consolidation Procedures

Dear Mr. Williams:

Enclosed for filing in the above-referenced proceeding are the original and 25 copies of the Reply Comments of Consumers United for Rail Equity (CURE). Also enclosed is a 3.5- inch diskette containing the text of the Reply Comments in WordPerfect format.

Please acknowledge receipt of the enclosed by stamping and returning to our messenger the two copies of our Reply Comments that are enclosed for this purpose.

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Sincerely,

Handwritten signature of J. Curtis Rich in black ink.
J. Curtis Rich

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Ex Parte No. 582
(Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES
Notice of Proposed Rulemaking by the Surface
Transportation Board to Modify its Regulations
at 49 CFR Part 1180 Governing Proposals for
Major Rail Consolidations

REPLY COMMENTS OF CONSUMERS
UNITED FOR RAIL EQUITY

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Counsel for Consumers United For Rail Equity

DATED: December 18, 2000

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 582
(Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES
Notice of Proposed Rulemaking

REPLY COMMENTS OF CONSUMERS UNITED FOR RAIL EQUITY

I Introduction

Pursuant to the Surface Transportation Board's (STB) October 3, 2000 issuance of proposed rules, Consumers United for Rail Equity (CURE), submits reply comments concerning major rail consolidation procedures.

CURE is a coalition of rail shippers, including public power generators, rural electric cooperatives, investor owned electric utilities, coal producers, chemical and petrochemical companies, that rely on rail transportation but are sometimes "captive" to a single railroad for at least some of their rail movements.¹ CURE advocates federal

¹ CURE's membership includes the following: Algona Municipal Utilities; American Electric Power Service Corporation; American Public Power Association; Arizona Electric Power Cooperative; Arkansas Electric Cooperative Association; Buckeye Power, Inc; Camelot Coal Company; Carolina Power and Light Company; Consumers Energy Company; Dairyland Power Cooperative; Edison Electric Institute; Empire District Electric Company; Entergy Services, Inc.; Ethyl Corporation; Exelon Corporation; Kansas City Power and Light Company; Minnesota Power; Municipal Electric Systems of Oklahoma; National Rural Electric Cooperative Association; Nebraska Public Power

policies that will promote competition and increase efficiencies in the rail industry.

After a full review of the initial comments filed in this rulemaking, CURE urges the STB to (i) adopt stronger merger review guidelines that evaluate the impact of each merger on competition and establishes a bar against mergers that fail to provide additional options and enhanced service for rail customers, (ii) reverse its current policy regarding bottlenecks and adopt a new policy requiring railroads to quote a rate between any two points on its system where traffic can originate, terminate or be interchanged, (iii) affirmatively grant the right of Class I and small railroads to interchange at terminal areas and interchange points without being disadvantaged in any way in terms of operations or pricing, and (iv) eliminate all "paper barriers" that arbitrarily restrict full interchange rights for Class II and III railroads.

This reply will focus on two critical issues raised in the initial comments to this rulemaking: (1) that the STB's proposed rules are overly discretionary and lack concrete pro-competitive conditions that automatically apply to future rail mergers; and (2) that this proceeding must be expanded beyond the merger context to apply new, pro-competitive rules to the entire rail industry.

District; The Ohio Valley Coal Company; Potomac Electric Power Company; Shawnee Coal Company; Southern Indiana Gas and Electric Company; and Wisconsin Power and Light Company.

II Federal Agencies, Shippers, Short Line and Regional Railroads and Others Agree That the STB's Proposed Rules Must Establish Mandatory Pro-Competitive Provisions that Apply to all Merging Railroads.

As CURE raised in its initial comments, a fundamental flaw of the proposed rules is that the STB relies on its own discretion as the primary mechanism by which it will ensure that future major rail mergers are sufficiently pro-competitive. This concern is widely shared by the participants in this proceeding.

The U.S. Department of Agriculture (USDA) was particularly pointed in its criticism of the proposed rules failure to effectively respond to the growing market-power of major railroads and impose conditions that will adequately protect agricultural producers, shippers and communities, as well as short line and regional railroads. The USDA accurately notes that "there is a lack of specificity in the rules and the Board relies upon voluntary offers, negotiations, and applicant-proposed penalties."² The U.S. Department of Transportation (USDOT) made a similar observation in noting that the STB's goal of achieving public benefits in future mergers was compromised by the vagueness of the proposed rules. The same concern is raised by virtually every shipper organization, electric utility, chemical company, forest products company and short line and regional railroad participating in this proceeding.

^{2/} Comments on the proposed rules submitted by the U.S. Department of Agriculture (November 17, 2000), at page 13.

In addition, the joint comments of subscribing coal shippers reflects the frustration of the shipper community with the failure of the STB to include in its proposal any shipper-sponsored, specific pro-competitive merger remedies. As the comments of the subscribing coal shippers point out,

the STB's new competition enhancing standard, no matter how well intentioned, is likely to provide no meaningful relief to captive coal shippers. The rail applicants in all recent major rail merger proceedings have claimed that the merger will enhance competition and, in some cases, the ICC/STB has agreed. Thus the new standard, by itself, is of little consequence because it is so opened-ended. The only way the STB can ensure that competition will be meaningfully enhanced is for the Board to prescribe, in advance, pro-competitive conditions of the type previously advocated by the Coal Shippers.³

These pro-competitive conditions advocated by the coal shippers are the same conditions supported by a majority of the shipping community. They include requiring merging railroads to quote a rate between any two points on its system where traffic can originate or be interchanged, increased terminal and interchange access, and the elimination of paper barriers that arbitrarily restrict full interchange rights for Class II and III railroads.

Finally, short line and regional railroads raise the same concerns regarding the lack of specificity in the STB's proposed rules. In their comments, the American Short Line and Regional Railroad Association (ASLRRRA) notes that while the STB has correctly identified the problems currently facing the rail industry, "the Board's proposed rules do not go far enough in specifying how these problems should be addressed."⁴

^{3/} Joint Comments of Subscribing Coal Shippers (November 17, 2000) at page 13.

^{4/} Comments of American Short Line and Regional Railroad Association (November 17, 2000) at page 2.

ASLRRA goes on to observe that “except for the comments of the Class I railroads, almost all of the more than 100 commenting parties consistently urge the Board to require meaningful conditions for any future rail merger.”⁵

The comments of rail shippers, short line and regional railroads, state agencies and federal agencies strike the same theme -- current regulatory policies have resulted in a few dominant major railroads who wield immense market power to the detriment of the public interest. Unfortunately, the proposed rules lack the specificity and the substance to bring about any real improvement over the status quo. As the USDA notes, “the proposed changes fall far short of protecting the public interest in the event of future major railroad consolidations.”⁶ The remedy lies in issuing final rules that impose an absolute obligation on merging railroads to adhere to clearly defined policies that promote rail competition rather than leave it up to negotiation on a case-by-case basis.

III The Public Interest is Best Served by Establishing a Pro-Competitive Regulatory Framework that Extends Beyond Mergers and is Applied to the Entire Rail Industry.

CURE believes that in order for the STB to carry out its obligation to protect the public interest and effectively deal with the underlying concerns that precipitated this rulemaking it must take action and apply new pro-competitive rules that apply to the entire industry irrespective of a merger. Specifically, we believe it is appropriate for the

^{5/} Comments of ASLRRA at page 6.

^{6/} Comments of USDA at page 23.

STB to expand the scope of this rulemaking beyond a narrow change of merger review standards and adopt new policies with respect to bottlenecks, terminal and interchange access and paper barriers that promote competition for all railroads. In the alternative, a separate rulemaking dealing with these issues on an industry-wide basis should be initiated. Federal agencies, shippers, short line and regional railroads, and at least one major railroad, reach the same conclusions in their initial comments to this rulemaking.

The USDOT is particularly on point with respect to the issue of expanding pro-competitive rules across the entire rail industry. In their comments they indicate that attempting to address bottlenecks and enhanced access in the context of mergers misses the more fundamental need to deal with improving competition throughout the entire rail industry. USDOT concludes that "the access question should be the subject of a separate, industry-wide, rulemaking."⁷

Even the Burlington Northern Sante Fe Railway Company (BNSF) has weighed in against limiting to the merger context remedies to problems that are industry-wide in scope. In their comments, BNSF includes the verified statement of Richard J. Pierce, a professor of law at George Washington University. Mr. Pierce notes,

if the Board is convinced that some major change in its regulatory policy, like an equal access requirement, would yield significant public benefits, the efficacy of that policy change will depend primarily on its scope. It would make little sense, and do little good, to impose it selectively on railroads that propose to merge. Instead, the agency should consider whether to apply the new approach to all railroads.⁸

^{7/} Comments of USDOT at page 8

^{8/} Comments of Burlington Northern Sante Fe Railway Company (November 17, 2000) at page 38.

CURE has the same fundamental concern with this rulemaking. Specifically, we fail to understand why the STB believes that certain competition enhancing policies are appropriate to a merged industry consisting of, perhaps, as few as two transcontinental railroads, but are not appropriate to the current industry structure of five remaining railroads – two in the West, two in the East and one in the center of the nation.⁹ As the testimony in this proceeding and virtually every other proceeding dealing with competition in the rail industry reflects, further mergers will only exacerbate the current problem of excessive market concentration and anti-competitive policies of the major railroads. For this reason, CURE again asks the STB to expand the scope of this rulemaking, or initiate a new rulemaking, to extend beyond a narrow change of merger review standards and to adopt new policies with respect to bottlenecks, terminal and interchange access and paper barriers that promote competition for all railroads.

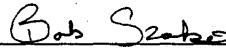
IV Conclusion

CURE strongly agrees with the STB's fundamental premise that future rail mergers must be measured against a pro-competitive standard. To meet this goal, however, the STB must make significant changes to the proposed rules and establish a final regulatory framework that is non-negotiable and unequivocal in its demand that future rail mergers enhance competition. Furthermore, the STB must reach beyond the merger context and substantively respond to the policies that currently impede

^{9/} The two large Western railroads are the Burlington Northern and Santa Fe Railway Company (BNSF) and Union Pacific Railroad Company (UP). The two large Eastern railroads are CSX Transportation, Inc. (CSX) and Norfolk Southern Railway Company (NS). The large system in the center of the nation is the Canadian National Illinois Central rail system (CNIC).

competition in the rail industry. CURE believes that all segments of the rail industry, including the major railroads, will benefit from a change in rail policy that promotes effective competition. We hope that this rulemaking will prove to be a first step in that direction.

Respectfully Submitted,



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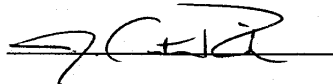


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December 18, 2000

CERTIFICATE OF SERVICE

I hereby certify that this statement of Consumers United for Rail Equity has been duly served on all Parties of Record identified on the Ex Parte 582 (Sub-No. 1) service list via first class mail in the United States Postal Service this 18th day of December, 2000.

A handwritten signature in black ink, appearing to read "J. Curtis Rich", written over a horizontal line.

J. Curtis Rich
Consumers United for Rail Equity